(3)

No. 91 484

In The

Supreme Court of the United States

October Term, 1991

IN RE GRAND JURY 89-4-72,
MICHIGAN ATTORNEY GRIEVANCE COMMISSION,
Petitioner,

-vs-

DOE #1, *Respondent.*

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOPATIN, MILLER, FREEDMAN, BLUESTONE,
ERLICH, ROSEN AND BARTNICK
By: LEE R. FRANKLIN (P 13649)
Counsel of Record
RICHARD E. SHAW (P 33521)
Attorneys for Respondent
1301 East Jefferson
Detroit, Michigan 48207
(313) 259-7800

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

COUNTERSTATEMENT OF QUESTIONS PRESENTED

ISSUE I

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT DISCLOSURE OF GRAND JURY MATERIALS TO THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION WAS NOT "PRELIMINARILY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING"?

ISSUE II

WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION HAD NOT DEMONSTRATED A PARTICULARIZED NEED FOR THE REQUESTED EVIDENCE?

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COUNTERSTATEMENT OF FACTS

On September 10, 1990, Dennis Path, an investigator for the State Bar of Michigan, filed a Request for Investigation with the State of Michigan, Attorney Grievance Commission ("Commission") alleging various improprieties by Doe #1 ("Doe" or "respondent"). The next day the Commission filed a Motion of the Michigan Attorney Grievance Commission for Disclosure of Evidence Compiled in the Course of Grand Jury Investigation Concerning Conduct of Attorneys,[1] in the United States District Court for the Eastern District of Michigan. The Commission had conducted no investigation into Path's allegations prior to its request for disclosure of grand jury proceedings. The grand jury proceedings had not resulted in an indictment. *In re Grand Jury 89-4-72*, 932 F2d 481, 482 (6th Cir. 1991)

The district court granted the Commission's request; respondent filed a motion to stay disclosure pending appeal, which was granted and the appeal proceeded. *Id.*, at 482-483.

On April 26, 1991, the United States Court of Appeals for the Sixth Circuit reversed the district court.

> Because the district court erred in concluding that disclosure to the Commission was "preliminary to or in connection with a judicial proceeding" and in determining that the Commission had demonstrated a particularized need for the evidence requested, we reverse. [*Id.*, at 482.]

On June 20, 1991, the Sixth Circuit denied the Commission's petition for rehearing, and for rehearing en banc.[2]

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[1] Photocopies of all the pleadings, Opinion and Orders in the United States District Court for the Eastern District of Michigan have been lodged under seal with the Clerk of this Court, according to the Commission.

[2] Commission's "Statement of the Case" omitted mention of the fact that the petition for hearing en banc had been requested and

(*concluded on page 2*)

The Commission advises this Honorable Court that it has been conducting a "vigorous investigation" and "subpoenaed *numerous* witnesses" (emphasis in original) since seeking grand jury materials disclosure a year ago. (Petitioner's Brief, p. 62)

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The Court of Appeals for the Sixth Circuit, thoroughly and comprehensively analyzed Rule 6(e)(3)(C)(i) of the Fed.R.Crim.P. The Court considered the opinions of both this Court and sister federal courts as applicable to the Michigan scheme for attorney discipline. The Sixth Circuit properly found that a two-tiered administrative procedure, with only discretionary review by the state supreme court, did not pass muster as "preliminarily to or in connection with a judicial proceeding." Although not necessary for reversal, the Sixth Circuit further determined, again relying on precedent, that the Commission had not demonstrated a particularized need for disclosure.

Through utilization of misstatement, misinterpretation and mischaracterization of the Michigan Court Rules and the Sixth Circuit's decision, the Commission seeks unmerited further review.

The Commission also selectively supplied some of the Michigan Court Rules in Chapter 9 of the Michigan Court Rules at pages 58-77 of its Appendix. We respectfully advise the Court that this is not a complete duplication of "Chapter of Professional Disciplinary Proceedings." When we discuss those Rules which the Com-

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(*continued from page 1*)

denied by all active judges of the Sixth Circuit with "no judge of this court having requested a vote on the suggestion for rehearing en banc. . . ." (Order 6/20/91), although the Order appears twice in its Appendix. (Petitioner's Appendix, pp. 47-50)

mission did not see fit to reproduce, we quote them in footnotes.

The Sixth Circuit opinion is firmly grounded on copious precedent, consistent with the decisions of sister courts of appeals, and presents no question for the exercise of this Court's discretionary review.

ISSUE I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT DISCLOSURE OF GRAND JURY MATERIALS TO THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION WAS NOT "PRELIMINARILY TO OR IN CONNECTION WITH A JUDICIAL PROCEEDING."

Introduction

After discussing the factual background of the within cause, the Sixth Circuit explained the historic role of the grand jury, its extraordinary investigatory powers, and the principle of grand jury secrecy which "has long been deeply ingrained in the American legal jurisprudence. *United States* v. *Seils Engineering, Inc.*, 463 U.S. 418, 424 (1983); *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *Federal Deposit Insurance Corp.* v. *Ernst & Whinney*, 921 F.2d 83, 86 (6th Cir. 1990)." *In re Grand Jury 89-4-72, supra*, at 483. The court recognized that the common law codification of grand jury secrecy set forth in Rule Fed.R.Crim.P. 6(e)(2) is subject to stated exceptions, and focused upon Rule 6(e)(3)(C)(i).

> Rule 6(e)(3)(C)(i) establishes a two-step standard permitting disclosure of grand jury material otherwise prohibited to a party who demonstrates that (1) the disclosure is sought "preliminarily to or in connection with a judicial proceeding[.]" and (2) a compelling need for disclosure exists which will overcome the general presumption in favor of grand jury secrecy. [*Id.*, at 483.]

The court addressed the first step and, quoting from *United States* v. *Baggot*, 463 U.S. 476, 463 S.Ct. 476, 77 L.Ed.2d 785 (1983), explained that the focus was on the actual use to be made of the material; *i.e.* whether the primary purpose of disclosure is to assist in the preparation or conduct of a judicial procedure. As *Baggot* is of controlling significance, we quote more extensively from that portion excerpted by the Sixth Circuit in the footnote.[3]

The Sixth Circuit considered the sort of proceedings that might qualify as judicial proceedings under *Baggot*. It began with Judge Learned Hand's seminal opinion, *Doe* v. *Rosenberry*, 255 F.2d 118 (2d Cir. 1958), wherein disclosure of grand jury information was sought for disciplinary proceedings against an attorney. The *Rosenberry* court found the state's disciplinary procedures to be "judicial in nature because they were presented before the Appellate Division of the New York Supreme Court." *Id.*, at 119.

Twenty-five years later, the *Rosenberry* definition had been given "the gloss" (*In re Grand Jury 89-4-72*, at 484) of succeeding decisions, culminating in *Baggot*, wherein this Court explained that "[t]he fact that judicial

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[3] The particularized-need test is a criterion of *degree*; the "judicial proceeding" language of (C)(i) imposes an additional criterion governing the *kind* of need that must be shown. It reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy. Rather, the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. Thus, it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material. If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted. See *United States* v. *Young*, 494 FSupp. 57, 60-61 (ED Tex.1980) [*Id.*, at 480] (emphasis in original).

redress may be sought, without more, does not mean that the Government's action is 'preliminar[y] to a judicial proceeding." *United States* v. *Baggot*, 463 U.S., at 480. The Sixth Circuit explained that "other circuits have suggested that disclosure . . . to an administrative body such as a bar disciplinary committee, may be considered preliminary to judicial proceeding where a *significant* judicial role exists in the operation of the regulatory/statutory scheme." *In re Grand Jury 89-4-72*, *supra*, at 485 (emphasis added) (citations omitted). The Sixth Circuit cited and distinguished virtually every case (*Id.*) which the Commission again parades before this Court. (Petitioner's Brief, pp. 11-12). We shall not unduly lengthen this brief by an exhaustive review of Sixth Circuit scholarship. We merely note, *e.g.*, that in *In the Matter of Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir. 1978) disclosure was upheld as the disciplinary procedure led to a judicial hearing.[1] Again, in *In the Matter of Federal Grand Jury Proceedings* (*United States* v. *Doe*), 760 F.2d 436 (2d Cir. 1985), a post-*Baggot* case, the court held that although the request before it was premature as no witnesses had yet testified in the disciplinary proceedings, disclosure continued to be permissible under New York attorney disciplinary procedure. Disclosure was permissible because investigations are ordered and cases subsequently heard by the Appellate Division of the New York Supreme Court.

Just as it persists in citing distinguishable cases, the Commission continues to rely upon *In the Matter of Electronic Surveillance*, 569 FSupp. 991, 999 (E.D. Mich. 1984), although it was not factually analogous.

In *Electronic Surveillance*, the Michigan Grievance Administrator sought information which had not been

[1] The district court's opinion, *United States* v. *Salamitro*, 436 FSupp. 240, 243 (D.Neb. 1977), indicates that the Nebraska procedure leads to a hearing before the Nebraska Supreme Court.

presented to the grand jury. Accordingly, that information was not secret and was not within the purview of Fed.R.Crim.P. 6(e)(2). *Id.*, 596 F.Supp., at 995, 997:

> The Grievance Administrator is seeking disclosure of approximately two hours of surveillance materials which were not played to any grand jury.
>
> The electronic surveillance materials sought by the Grievance Administrator were not presented to the grand jury. They are not, therefore, within the literal meaning of "matters occurring before the grand jury." Since disclosure would not implicate any of the reasons underlying the policy of grand jury secrecy, the court holds that the electronic surveillance material sought by the Grievance Administrator are not governed by Rule 6(e). (footnote omitted).

Having determined that the requested information was not protected by Fed.R.Crim.P. 6(e)(2), the *Electronic Surveillance* opinion noted that if Rule 6(e) were germane, the court would find that attorney disciplinary proceedings are judicial in nature, as contemplated by Rule 6(e).

The later observation was clear *obiter dicta*. In addition, *Electronic Surveillance* is fatally flawed, as is revealed by a review of Michigan's attorney disciplinary procedure, discussed *infra*. The Sixth Circuit properly found it unnecessary to give *Electronic Surveillance* weight or deference pursuant to *Salve Regina College* v. *Russell*, ___ U.S. ___, 111 S.Ct. 1217, ___ L.Ed.2d ___ (1991), and held that *In the Matter of Electronic Surveillance*, *supra*, was incorrectly decided.

It is clear beyond cavil that administrative agencies, and proceedings before such agencies, are not entitled to disclosure. See, *e.g. In re Grand Jury Proceedings*, 309 F.2d 440 (3d Cir. 1962), which denied a grand jury disclosure request by the Federal Trade Commission; and

United States v. *Baggot*, *supra*, which refused disclosure to the Internal Revenue Service.

After extensive analysis, the Sixth Circuit determined that "the Michigan attorney discipline procedures do not evidence a substantial judicial role in the proceedings." *In re Grand Jury 89-4-72*, *supra*, at 487. The Court properly held that Michigan uses "an administrative scheme to regulate the practice of law . . . with only discretionary review by the state supreme court. . . ." *Id.*, at 488. Accordingly, "the Commission falls within the same category as do all administrative agencies which are denied access to federal grand jury material under Rule 6(e)(3)(C)(i), even though the Commission's purview includes the regulation of the right to practice law." *Id.*

A. The Sixth Circuit Correctly Analyzed Michigan's Attorney Disciplinary Procedure.

The Commission's attack on the Sixth Circuit reaches a nadir in its argument contending that the Court analyzed the Michigan attorney discipline system incorrectly. (Petitioner's Brief, pp. 20-30) It is replete with misstatements, mischaracterizations and misinterpretations. We refer to some of the most glaring examples.

The first one appears at pages 21-22 of Petitioner's brief wherein the Commission said:

> [T]he Court misstated the role of the Attorney Discipline Board when it stated that it is the "Board's responsibility to investigate and discipline attorneys suspected of misconduct. Rule 9.105."

The Commission then asserted that the Attorney Discipline Board does not "investigate," it supervises and disciplines. (Petitioner's Brief, p. 22)

The Sixth Circuit actually said:

> The primary responsibility of the Board is to investigate and discipline attorneys suspected of misconduct. M.C.R. 9.105.
>
> The Board's investigatory needs are served by the Attorney Grievance Commission which supervises and approves inquiries into alleged attorney malfeasance. M.C.R. 9.108(D)(2); 9.109 (A)(5). . . . [*In re Grand Jury 89-4-72, supra*, 932 F.2d, at 485.]

The Sixth Circuit understood perfectly that the Attorney Grievance Commission does the investigating and the Attorney Discipline Board does the disciplining. By quoting one sentence in the opinion and omitting the following sentence, the Commission attempts to mislead this Court.

Next, the Commission states that

> The Court of Appeals also mischaracterized the disciplinary hearings before the Board as being "ex parte." (Doe Opinion) (citation omitted). [Petitioner's Brief, p. 22]

The Commission cites to the page in its Appendix which is found in *In re Grand Jury 89-4-72*, 932 F.2d, at 487. The Court of Appeals did *not* say that the Board's disciplinary proceedings were *ex parte*. The phrase "*ex parte*" appears in a direct quotation from another case. In addition, the Commission's investigation is, in fact, *ex parte*. M.C.R. 9.112-9.114.[5]

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[5] Rule 9.112 Requests for Investigation

(A) Availability to Public. The administrator shall furnish a form for a request for investigation to a person who alleges misconduct against an attorney. Forms must be available to the public through each state bar office and county clerk's office. Use of the form is not required for filing a request for investigation.

(*continued on page 9*)

The Commission says "Recently the Michigan Supreme Court amended its rules so that now all members of the Attorney Discipline Board are appointed by

(*continued from page 8*)

(B) Form of Request. A request for investigation of alleged misconduct must

(1) be in writing;

(2) describe the alleged misconduct, including the approximate time and place of it;

(3) be signed by the complainant; and

(4) be filed with the administrator.

(C) Handling by Administrator.

(1) *Request for Investigation of Attorney.* After making a preliminary investigation, the administrator shall either

(a) notify the complainant and the respondent that the allegations of the request for investigation are inadequate, incomplete, or insufficient to warrant the further attention of the commission; or

(b) serve a copy of the request for investigation on the respondent by ordinary mail at the respondent's address on file with the State Bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. Service is effective at the time of mailing, and nondelivery does not affect the validity of service. If a respondent has not filed an answer, no formal complaint shall be filed with the board unless the administrator has served the request for investigation by registered or certified mail return receipt requested.

(2) *Request for Investigation of Judge.* The administrator shall forward to the Judicial Tenure Commission a request for investigation of a judge, even if the request arises from the judge's conduct before he or she became a judge or from conduct unconnected with his or her judicial office. MCR 9.116 thereafter governs.

(3) *Request for Investigation of Member or Employee of Commission or Board.* Except as modified by MCR 9.131, MCR 9.104–9.130 apply to a request for investigation of an attorney who is a member of or is employed by the board or the commission.

(*continued on page 10*)

the Michigan Supreme Court." (Petitioner's Brief, p. 23) The inference is that the Sixth Circuit erred in its

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Rule 9.113 Answer by Respondent

(A) Answer. Within 21 days after being served with a request for investigation under MCR 9.112(C)(1)(b), the respondent shall file with the administrator a signed, written answer in duplicate fully and fairly disclosing all the facts and circumstances pertaining to the alleged misconduct. The administrator may allow further time to answer. Misrepresentation in the answer is grounds for discipline. The administrator shall provide a copy of the answer and any supporting documents to the person who filed the request for investigation unless the administrator determines that there is cause for not disclosing some or all of the documents.

(B) Refusal or Failure to Answer.

(1) A respondent may refuse to answer a request for investigation on expressed constitutional or professional grounds.

(2) The failure to a respondent to answer within the time permitted is misconduct. See MCR 9.104(7).

(3) If a respondent refuses to answer under subrule (B)(1), the refusal may be submitted to a hearing panel for adjudication.

(C) Attorney-Client Privilege. A person who files a request for investigation of an attorney waives any attorney-client privilege that he or she may have as to matters relating to the request for the purposes of the commission's investigation.

Rule 9.114 Action by Administrator or Commission After Answer

(A) Action After Investigation. After an answer is filed or the time for filing expires, the administrator may assign the request and answer for further investigation or informal hearing. When investigation is complete, the administrator shall refer the request to the commission for its review. The commission may direct that a complaint be filed, that the request be dismissed, or that the respondent be admonished with his or her consent.

(B) Assistance of Law Enforcement Agencies. The administrator may request a law enforcement office to assist in an investigation by furnishing all available information about

(*concluded on page 11*)

description. The Commission neglected to mention that this amendment was effective June 3, 1991, over five weeks after the Sixth Circuit opinion issued.

Most important, it is irrelevant that the Michigan Supreme Court appoints the lay persons and attorneys who respectively constitute the Attorney Grievance Commission and the Attorney Discipline Board. No

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(*continued from page 10*)

the respondent. Law enforcement officers are requested to comply promptly with each request.

(C) Subpoenas.

(1) On request of the administrator or the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents and other tangible things before the administrator or an investigator concerning matters then under investigation.

(2) A person who without just cause, after being commanded by a subpoena, fails or refuses to appear and give evidence, to be sworn or affirmed, or to answer a proper question after being ordered to do so is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(D) Report by Administrator. The administrator shall inform the complainant and, if the respondent answered, the respondent, of the final disposition of every request for investigation dismissed by the commission without a hearing before a hearing panel.

(E) Retention of Records. All files and records relating to allegations of misconduct by an attorney must be retained by the commission for the lifetime of the attorney, except as follows:

(1) The administrator may destroy the files or records relating to a request for investigation dismissed by the commission after 3 years have elapsed from the date of dismissal.

(2) If no request for investigation was pending when the files or records were created or acquired, and no related request for investigation was filed subsequently, the administrator may destroy the files or records after 3 years have elapsed from the date when they were created or acquired by the commission.

judges serve on either body. Pursuant to its rule-making power,[6] the Michigan Supreme Court appoints the members who serve on the Standard Jury Instruction Committee.[7] Some of them are judges; all are attorneys. Judicial appointment of personnel does not transform the proceedings of an administrative agency into a judicial proceeding.

Finally, the Commission makes a great "to do" over the Sixth Circuit's references to funding by a "private organization." (Petitioner's Brief, p. 24) It is clear from a reading of the opinion as a whole that the use of that phrase (*In re Grand Jury 89-4-72, supra*, 932 F.2d, at 487) was a reference to the private funding (*Id.*, at 485) of M.C.R. 9.105. The applicable sentence in the Rule is:

> The legal profession, through the State Bar of Michigan, is responsible for the reasonable and necessary expenses of the board, the commission, and the administrator.

Clearly, the Sixth Circuit was distinguishing the Michigan agency's funding from funding raised from, or belonging to, the people or community at large. *Black's Law Dictionary*, 4th ed, p. 1393.

Most critical, the Sixth Circuit fully appreciated that in Michigan a Commission of nonjudges investigates and brings charges against attorneys (prosecutorial arm) (M.C.R. 9.108) which are heard and decided by a panel of the Attorney Discipline Board (adjudicative arm) (M.C.R. 9.110; M.C.R. 9.111; M.C.R. 9.115); and appeals from Board

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[6] The supreme court has the authority to promulgate and amend general rules governing practices and procedure in the supreme court and all other courts of record. . . . [M.C.L. 600.223; M.S.A. 27A.223.]

[7] The Standard Jury Instruction Committee appointed by the Supreme Court has the authority to adopt standard jury instructions and to amend or repeal standard jury instructions in effect. . . . [M.C.R. 2.516(D)(1).]

panels are heard by the full Board (nonjudges) (M.C.R. 9.118).[8] After charges have been brought by private citi-

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[8] Rule 9.118 Review of Order of Hearing Panel

(A) Review of Order: Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of the hearing panel filed under MCR 9.115(J). A petition for review must set forth the reasons and grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition on the other party and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner.

(3) A delayed petition for review may be considered by the board under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. On timely filing of a petition for review, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The board must serve the order to show cause on the administrator, complainant, and respondent at least 21 days before the hearing. Failure to comply with the order to show cause, including but not limited to a requirement for briefs, may be grounds for dismissal of a petition for review. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by the subboard of at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony.

(concluded on page 14)

zens and heard by two layers of private citizens, the Michigan Supreme Court may, in its discretion, grant review.[9] Significantly, in *Electronic Surveillance*, *supra*, the case so heavily relied upon by the Commission, the federal district court judge observed that leave to appeal is rarely granted. *Id.*, 569 FSupp., at 999.

All the Commission's attempts to mislead are unavailing. The Sixth Circuit accurately assessed the essence of the Michigan discipline procedures:

> On the record here we find the Michigan attorney discipline procedures do not evidence a substantial judicial role in the proceedings. We

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(*continued from page 13*)

pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of a hearing panel.

(D) Decision; Motion for Reconsideration; Stay. After the hearing on the order to show cause, the board may affirm, amend, reverse, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier. The board may grant a stay pending its decision on a motion for reconsideration, which may be filed at any time before the board's order takes effect. If the board grants a stay, the stay remains effective for 21 days after the board enters its order granting or denying reconsideration.

(E) Filing Orders. The board must file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

[9] M.C.R. 7.301 Jurisdiction and Term

(A) Jurisdiction. The Supreme Court may:

* * *

(3) review by appeal a final order of the Attorney Discipline Board (See MCR 9.122.)

> are not prepared to call an administrative hearing before a panel of private attorneys and laypersons, funded by a private organization, with limited discretionary review to the Michigan Supreme Court, a "judicial proceeding" within the meaning of Rule 6(e)(C)(i). That the disciplinary proceedings are sanctioned under the authority of the state supreme court is irrelevant. No amount of artificial judicial procedure or due process can transform such an administrative panel into a judicial body within the meaning of the Rule. [*In re Grand Jury 89-4-72*, *supra*, 932 F.2d, at 487.]

As the Sixth Circuit pointed out, even a mandatory Michigan Supreme Court review would not automatically transform an administrative hearing into a judicial hearing in light of *Baggot*. *Id.*

Michigan has chosen an administrative scheme, which places the Commission in the same category with all other administrative agencies which are denied access to grand jury material. *Id.*, at 488.

> Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i). [*Baggot*, *supra*, 463 U.S., at 482.]

The Sixth Circuit scrupulously followed this Court's pronouncements in arriving at its conclusion. Clearly, further review is not merited.

B. The Sixth Circuit Properly Held That An Administrative Agency Is Denied Access To Federal Grand Jury Material Under Rule 6(e)(3)(C)(i).

Petitioner devotes pages 30-36 of its brief to a plea for a change in Rule 6(e)(3)(C)(i). This argument undoubtedly had its genesis in the Sixth Circuit's observation,

set forth in footnote 10.[10] *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 572-573, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983), which we discuss and quote *infra* under the "particularized need" issue, makes it clear that this Court will not expand the exceptions under the Rule to suit the predilections of a petitioner in a given case.

The Sixth Circuit scrupulously followed the dictates of this Court in its many expressions of the necessity to hold inviolate the secrecy of the grand jury,[11] and to protect the Rule from being swallowed by its exceptions. *Baggot* makes it clear that administrative agencies are not within the ambit of Rule 6(e)(3)(C)(i).

> The fact that judicial redress may be sought, without more, does not mean that the Government's action is "preliminar[y] to a judicial proceeding." Of course, it may often be loosely said that the Government is "preparing for litigation," in the sense that frequently it will be wise for an agency to anticipate the chance that it may be called upon to defend its actions in court. That, however, is not alone enough to bring an administrative action within (C)(i). Where an agency's action does not require resort to litigation to accomplish the agency's present goal, the action

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[10] We are not unaware of those commentators who have urged the courts to make grand jury materials more accessible to administrative agencies in an effort to reduce duplicative investigations. *See, e.g.*, Note, 80 Mich. L. Rev. at 1672. However, Rule 6(e)(3)(C)(i) is not a rule of convenience; without an unambiguous statement to the contrary from Congress, we cannot, and must not, breach grand jury secrecy for any purpose other than those embodied by the Rule. Accordingly, we find disclosure to the Commission is not ordered "preliminarily to or in connection with a judicial proceeding" within the limited secrecy exception provided by Rule 6(e)(3)(C)(i). [*In re Grand Jury 89-4-72, supra*, at 488.]

[11] *E.g.*, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1948); and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983).

> is not preliminary to a judicial proceeding for purposes of (C)(i). [*Baggot, supra*, 463 U.S., at 481-482.]

The agency action here does not require resort to litigation, but rather takes place without judicial intervention — which can only be obtained by grace — after two levels of nonjudicial citizens have, respectively, meted out and reviewed punishment. Indeed, as noted above, such grace is rarely granted. The mantle of secrecy remains in place under such circumstances.

Petitioner seeks to equate this case with *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1260 (11th Cir. 1984), *cert. denied*, 469 U.S. 889, 105 S.Ct. 254, 83 L.Ed.2d 1991 (1984). There is no proper analogy. There, a federal district court judge had previously been indicted, tried and acquitted. Five federal judges were investigating whether the aforedescribed "Article III judge should be recommended for impeachment by Congress, otherwise disciplined, or granted a clean bill of health. . . ." *Id.*, at 1269. The federal statute, 28 U.S.C. § 372(C)(5), gave the committee express statutory authority to "conduct an investigation as extensive as it considers necessary. . . ." *Id.*

The court explained that

> Beyond this construction derived from the breadth of the statutory language, there is support in legislative history for the specific proposition that Congress intended a judicial investigating committee to have access to grand jury minutes. . . . [*Id.*, at 1270.]

After analysis of the legislative history, the court said

> We accordingly view an investigating committee's petition to inspect grand jury materials as being backed by a congressional mandate; and we believe this mandate furnishes special justification for the district court to exercise its super-

> visory power upon a committee's request. . . . [*Id.*]

Although the court also found a further justification of this investigation of a federal judge by other federal judges in the Rule 6(e)(3)(C)(i) and cited, *inter alia*, *Erdmann* v. *Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889, it is noteworthy that *Erdmann* dealt with the New York disciplinary proceedings discussed *supra*. In New York the Appellate Division of each judicial department hears alleged attorney misconduct cases. We have gone full circle: where the judiciary does the hearing and deciding, the state bar disciplinary proceedings lie within the ambit of the Rule 6(e)(3)(C)(i) exception. Where layers of citizen administrative bodies hear and decide state bar disciplinary matters, they are beyond the pale.

It is worthy of passing note that, in Michigan, the fate of its judges alleged to have committed acts of misconduct is not placed in lay hands. The Judicial Tenure Commission can only recommend; the Michigan Supreme Court makes the decision. See *In the Matter of Del Rio*, 400 Mich. 665, 689, 256 N.W.2d 727 (1977):

> Initially, we must make it clear that the respondent is operating under a gross misconception if he believes that the Commission exercises any *disciplinary* function. Pursuant to GCR 1963, 932.25, this Court and this Court alone decides what, if any, disciplinary action shall be taken against any elected member of the state judiciary.[12]

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[12] G.C.R. 1963, 932.25, referred to in *Del Rio*, is the current M.C.R. 9.225. We quote same and its Note, and advise the Court that the "proceedings" referred to in the text of the Rule are the proceedings of the Judicial Tenure Commission, which are reviewed *de novo*. *In re O'Brien*, 430 Mich. 323, 422 N.W.2d 685 (1988); *In re Loyd*, 424 Mich. 514, 384 N.W.2d 9 (1986).

> Rule 9.225 Decision by Supreme Court
>
> The Supreme Court shall review the record of the proceedings and shall file a written opinion and judgment, which

(*concluded on page 19*)

An administrative agency cannot avail itself of Rule 6(e)(3)(C)(i), be it the Federal Trade Commission (*In re Grand Jury Proceedings*, 309 F.2d 440, 443 [3d Cir. 1962]); the Internal Revenue Service (*Baggot*, *supra*) or the Michigan Attorney Grievance Commission (*In re Grand Jury 89-4-72*, *supra*).

C. The Principle Of Grand Jury Secrecy, As Expressed By This Court And Codified By Rule 6(e), Is Not Susceptible To Administrative Contortion Or Subversion.

Petitioner argues at length (Commission's Brief, pp. 37-40), that Rule 6(e) violates a Michigan Rule of Professional Conduct by precluding a United States attorney, who is a member of the Michigan bar, from disgorging grand jury proceedings to the Michigan Grievance Commission. This novel distortion of the Michigan Court Rules is unsupported by precedent and is raised for the first time in the petition for certiorari. It merits a swift demise.

Petitioner invites this Court to invalidate 6(e) and the volumes of jurisprudence protecting grand jury secrecy so that a United States attorney can open the grand jury room to an administrative agency.

This is, we submit, preposterous, convoluted reasoning. Nothing in M.R.P.C. 8.3 requires a United States attorney to violate the Federal Rules of Criminal Procedure. If an applicant for grand jury proceedings can fit itself into an exception, the United States attorney will be ordered by a federal district court to turn over the records pursuant to a Rule 6(e)(3)(D) proceeding. If an applicant cannot fit itself into a Rule 6(e) exception, the

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(*continued from page 18*)

> may direct censure, removal, retirement, suspension, or other disciplinary action, or reject or modify the recommendations of the commission.
>
> *Note*
> MCR 9.225 is substantially the same as GCR 1963, 932.25.

secrecy is inviolate. The United States attorney cannot act without a federal court order. An administrative agency, such as petitioner here, cannot order such action. We respectfully submit that the argument is absurd.

ISSUE II

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY HELD THAT THE MICHIGAN ATTORNEY GRIEVANCE COMMISSION HAD NOT DEMONSTRATED A PARTICULARIZED NEED FOR THE REQUESTED EVIDENCE.

As the Sixth Circuit held "that disclosure to the commission is not preliminary to a judicial proceeding" *In re Grand Jury 89-4-72, supra*, 932 F.2d at 488-489, it did not need to devote extensive effort to the second prong of Rule 6(e)(3)(C)(i) disclosure, particularized need. However, it did note that the lower court's conclusion as to the degree of need requisite was inconsistent with its recent holding in *Federal Deposit Insurance Corp.* v. *Ernst & Whinney*, 921 F.2d 83 (6th Cir. 1990).

The *Ernst & Whinney* decision, which the Commission also disputes, was firmly grounded upon the principles long expounded by this Court:

> Finding that we have jurisdiction, we now grant the writ of mandamus. Federal Criminal Procedure Rule 6(e)(2)'s general prohibition of disclosure of matters occurring before a federal grand jury represents a strong and longstanding policy designed to promote the candid and free testimony of witnesses who appear before a grand jury. *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 432, 103 S.Ct. 3133, 3142, 77 L.Ed.2d 743 (1983); *United States* v. *Procter & Gamble*, 356 U.S. 677, 681-82, 78 S.Ct. 983, 985-86, 2 L.Ed.2d 1077 (1958); *In re Grand Jury Proceedings*, 841 F.2d 1264, 1268 (6th Cir.1988). Consequently, exceptions to the general rule are made only in cases of compelling necessity — "where there is proof that

> without access to the grand jury materials, a litigant's position would be 'greatly prejudiced' or 'an injustice would be done.'" *United States* v. *Procter & Gamble*, 356 U.S. at 681-82, 78 S.Ct. at 986. [*Id.*, at 86.]

We discuss the landmark citations *infra*. *Ernst & Whinney* also answered petitioner's argument as to "district court discretion" and succinctly disposed of assertions of relevance, expediency or cost-cutting:

> While we recognize that the district court has wide discretion to decide whether the need for secrecy predominates or the need for disclosure predominates, the discretion is predicated on the district court being properly seized of the question by the movant's demonstration of a particularized need. In the case before us, Ernst & Whinney has merely subpoenaed grand jury documents from the Bureau. They have not made any particularized showing as required in *Douglas Oil*.
>
> The fact that the grand jury documents are relevant or that production of them by the Bureau would expedite civil discovery or reduce expenses for the parties is insufficient to show particularized need when the evidence can be obtained through ordinary discovery, *i.e.*, subpoenaing the documents from other sources, or pursuing other routine avenues of investigation. [*Id.*, at 86-87.] (citations omitted).

We expand only to emphasize the propriety of the Sixth Circuit's opinion. Two of this Court's decisions, cited in *Ernst & Whinney* are controlling: *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) and *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). Significantly, in neither case was disclosure permitted. In *Procter & Gamble*, the Court noted "a long established

policy that maintains the secrecy of the grand jury proceedings in the federal courts." *Id.*, 356 U.S., at 681 (footnote omitted). In a footnote, the Supreme Court repeated the reasons for secrecy, stating:

> In *United States* v. *Rose*, 3 Cir., 215 F.2d 617, 628-629, those reasons were summarized as follows:
>
> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosure by persons who have information with respect to the commission of crimes; (5) *to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation*, and from the expense of standing trial where there was no probability of guilt. [*Id.*] (emphasis supplied).

The *Procter & Gamble* opinion explained that there are instances when a compelling necessity "will outweigh the countervailing policy. But *they must be shown with particularity*." *Id.*, 682 (emphasis supplied). The Court continued:

> No such showing was made here. The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done. . . . [*Id.*]

The Court concluded:

> It is only where the criminal procedure is subverted that "good cause" for *wholesale* discovery and production of a grand jury transcript would be warranted. . . . [*Id.*, at 684.] (emphasis in original).

In the second United States Supreme Court decision, *i.e. Sells Engineering, supra*, while recognizing that it would be a substantial help to a Justice Department civil attorney to have "free access to a storehouse of evidence compiled by a grand jury," *Id.*, at 431, the Court nevertheless explained that this was insufficient.

> The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense. The same argument could be made for access on behalf of any lawyer in another Government agency, or indeed, in private practice. We have consistently rejected the argument that such savings can justify a breach of grand jury secrecy. [*Id.*] (citations omitted).

Most critically, the Court observed:

> In most cases, the same evidence that could be obtained from the grand jury will be available through ordinary discovery or other routine avenues of investigation. [*Id.*]

In the case at bar, the Commission has subpoena powers available to it. M.C.R. 9.114(C). The Commission initially spurned use of these powers, preferring instead to rely solely on the grand jury investigation (which found no evidence of wrongdoing to support an indictment).[13] Its motion for disclosure was filed the day after

[13] Since there was no indictment and the grand jury's proceedings remain secret, the statement in the Commission's brief that "the Commission learned that the investigations revealed serious violations of ethical rules governing the attorneys' conduct" (Petitioner's Brief, p. 54) has no discernible factual basis.

its investigator filed a request for an investigation. It contained no showing of particularized need. The Commission tells this Court that in the year that has elapsed since its own investigator filed a Request for an Investigation and it sought disclosure, it "has subpoenaed *numerous* witnesses." (Petitioner's Brief, p. 62) (emphasis in original). These numerous witnesses vitiate the Commission's rationale for grand jury disclosure.

The Commission's disclosure motion stated:

> (8) Unless the Commission is granted access to evidence compiled in the course of the Grand Jury investigation relating to attorneys, an injustice will result. The Commission will be unable to investigate charges that certain of this state's attorneys have violated their professional responsibilities as mandated by the Michigan Supreme Court.

This conclusory paragraph was unsupported by facts. According to the Commission's own statements in its brief to this Court, the events of the past year have refuted the threat in paragraph 8. Witnesses have come forward and the investigation has proceeded.

Not only does the Commission fail to show a "particularized need" which is the *sine qua non* for disclosure, but it also fails to justify a fishing expedition into secret grand jury proceedings which found no indictable offense, when its subpoena powers are producing witnesses.

Next, petitioner erroneously asserts that the reasons for grand jury secrecy are no longer applicable because the grand jury proceedings are terminated. In the appellate cases the Commission cited wherein disclosure was permitted after termination of grand jury proceedings, the investigation had resulted in an indictment. See *e.g.*, *Illinois* v. *Sarbaugh*, 552 F.2d 768 (7th Cir. 1976) and *In re Grand Jury*, 583 F.2d 128 (5th Cir. 1978). In the latter case, not only had the appellant been indicted and pled *nolo contendere*, but the attorneys seeking disclosure

were Department of Justice attorneys who were entitled to access without a court order. In its cited case from the Eastern District of Pennsylvania, *i.e. In re Grand Jury Proceedings*, 483 F.Supp. 422, 424 (E.D. Pa. 1979), the court refused to disclose federal grand jury proceedings sought by a state assistant attorney general and noted that the "bare assertion that the disclosure is 'in the interest of justice' fails to meet that standard." That standard, according to the Court, was a "compelling, particularized need." *Id.* Further, the Pennsylvania district court explained:

> Even when the grand jury has concluded its operations, the Supreme Court still requires the District Court to consider not only the immediate effects upon a particular grand jury but also the possible effect upon the functioning of future grand juries. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). [*Id.*, at 425.]

Conclusion of grand jury proceedings did not justify disclosure in Pennsylvania; it does not justify disclosure in Michigan. Respondent is an "innocent accused who is exonerated from disclosure of the fact that he has been under investigation" and accordingly entitled to protection. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) citing Third Circuit precedent.

Next, petitioner trivializes the necessity to protect respondent's reputation. This is unconscionable. Respondent has an unblemished, enviable reputation established through thirty-five years of distinguished practice. He is entitled to the protection of the law, no less than any other citizen.

Respondent can take no comfort in the purported confidentiality of a Commission investigation under M.C.R. 9.126. Its long-term survival is questionable. In the June 28, 1990 Special Counsel's Summary Report to Supreme

Court in In *the Matter of The Attorney Grievance Commission Investigation*, S.Ct. Admin. Order, November 22, 1989, Special Counsel Theodore Souris recommended, *inter alia*, that M.C.R. 9.126(A) and (D) be "amended to protect only unevaluated allegations from public disclosure and only for the period prior to their dismissal, issuance of admonition or the filing of a formal complaint." *Id.*, at 19. Many amendments to the rules governing attorney grievances have followed with celerity in the fifteen months since the issuance of that report. Subchapter 9.100 of the Michigan Court Rules covers attorney discipline. The following rules have been amended during this time period: M.C.R. 9.105; 9.108 (three changes); 9.109 and 9.114 (effective July 27, 1990); 9.108 (effective September 14, 1990); 9.108; 9.110; 9.112; 9.113; and 9.126 (two changes) (effective February 1, 1991); and another change to M.C.R. 9.110 (effective June 3, 1991). Although the secrecy of an investigation under MCR 9.126, is still intact, possibly because of opposition to the Souris proposal by distinguished members of Michigan bench and bar,[14] the recent pace and extent of rule amendment undermines confidence in its continuing viability.

Next, Commission's statement that "Doe has failed to indicate any specific harm that would result from disclosure of grand jury evidence in this case" (Petitioner's Brief, p. 62) reveals callous insensitivity. The disclosure of the fact of a grand jury investigation is the harm. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438 (11th Cir. 1987) which the Commission cites, involved disclosure of grand jury materials[15] to the House Judiciary

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[14] M. Franck, "Public Disclosure of Innuendo, Unsubstantiated Allegations and other Assaults on Reputation," 70 Mich. B.J. 12, January, 1991; the Honorable Robert B. Webster, President, Michigan State Bar, July 23, 1990 letter disseminated to all Michigan attorneys.

[15] These were the same materials and involved the same federal judge who had been indicted, tried and acquitted, discussed *supra*. *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984), *supra*.

Committee which had initiated an impeachment inquiry. The parties agreed, that "a Senate impeachment trial qualifies as a 'judicial proceeding' and that a House impeachment inquiry is 'preliminary to' the Senate trial." *Id.*, at 1440. The only question was whether there was a sufficient showing of particularized need. In that case there was no policy consideration of protecting an "innocent accused who has been exonerated from disclosure of the fact that he has been under investigation. . . ." *Id.*, at 1441, as there had been a public trial. In the case at bar, Doe is entitled to that protection.

The Commission improperly engages in attempted burden-shifting. It has the burden of showing a particularized need pursuant to copious precedent discussed *supra*. Absent that showing, respondent is entitled to rely upon the secrecy of grand jury proceedings and the narrowly drawn exceptions thereto, zealously guarded by the federal appellate courts. We refer to *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 103 S.Ct. 1356, 75 L.Ed.2d 281 (1983) (cited by petitioner) which affirmed the denial of grand jury material sought in an antitrust action. In the *Abbott* case, the Attorney General of the state of Illinois sought disclosure under the Clayton Act, § 4F(b) as amended, 15 U.S.C. § 15f(b). He requested the release of all grand jury material — as here. This Court quoted the comments of the Chief Judge of the district court, giving them "special weight" in footnote eight, where he explained:

> Its wholesale disclosure could be embarrassing, if not destructive of third parties or unindicted individuals and corporations concerned when witnesses are called upon to testify or furnish evidence which involves them. . . . [*Id.*, at 564.]

The request for disclosure was consistently denied. There, as here, the argument was that the burden would be satisfied by facilitating the state's access. We quote from the Court's final paragraph which has applicability here:

> Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants. But the rule is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so. The general goals of enhancing federal-state cooperation in antitrust enforcement, and encouraging more state lawsuits against price-fixers, are not sufficient. The statute as enacted by Congress simply does not authorize the Attorney General to turn over the entire investigative record of a federal antitrust grand jury to a state attorney general who has not complied with the judicially developed standards implementing Rule 6(e). Because the disclosure requested by the State in this case is not permitted by Rule 6(e) on the basis of the showing it made to the District Court, the judgment of the Court of Appeals is affirmed. [*Id.*, at 572-573] (footnotes omitted).

Just as the federal antitrust law did not authorize disgorging grand jury proceedings to an attorney general who had not complied with the judicially developed standards implementing Rule 6(e), no assertion of amorphous needs by an administrative agency with subpoena powers can support disclosure.

The Sixth Circuit decision in the case at bar is consistent with myriad appellate decisions which preserve grand jury secrecy from the multitude of petitioners who seek to unveil the proceedings.

The cases demonstrating the need to maintain the secrecy of grand jury testimony against assault by disclosure motions are many and varied. For example, in *Texas* v. *United States Steel Corp.*, 546 F.2d 626 (5th Cir. 1977), the Fifth Circuit rejected the State's claim that it did not need to show a particularized need in antitrust

litigation. *In re Holovachka*, 317 F.2d 834 (7th Cir. 1963), is another example of appellate court reversal of a disclosure order. See also *Blumenfeld* v. *United States*, 284 F.2d 46, 50 (8th Cir. 1960), *cert. denied*, 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692 (1961), where this Court referred to the motion as a "fishing expedition," and held that defendant's motion to inspect grand jury minutes was properly denied because there was no clear showing of good cause.

Between the *Procter & Gamble* case, decided in 1958, and the 1983 *Sells Engineering* decision, came *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). In *Douglas*, this Court explained that by preserving the secrecy of grand jury proceedings, it

> assures that persons who are accused but exonerated by the grand jury will not be held up to public ridicule. [*Id.*, at 219.]

The *Douglas* Court set forth the standard for determining when the traditional secrecy may be broken as follows:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed. Such a showing must be made even when the grand jury whose transcripts are sought has concluded its operations, as it had in *Dennis*. . . . [*Id.*, at 222.]

Douglas Oil conforms, of course, with *Sells Engineering*, which further defined the standard as requiring a "strong showing of a particularized need," a showing that the need for disclosure is greater than the need for secrecy, and, finally, a showing that the request is structured to cover only the needed material.

Respondent submits that the trial court failed to recognize that the Commission's disclosure motion was fatally flawed. There was no showing of particularized need; no showing that disclosure must prevail over the need for secrecy; and no well structured request. In short, the Commission's request is a fishing expedition, designed for defeat under the law. The Sixth Circuit recognized the deficiencies in the motion and reversed the district court.

In summary, the Court of Appeals for the Sixth Circuit here rendered a decision which follows the precepts of this Court as expressed in voluminous precedent and is consistent with the decisions of the Courts of Appeals from its sister circuits. The Commission did not satisfy either prong of Rule 6(e)(3)(C)(i). It has no meritorious basis for seeking review.

RELIEF

WHEREFORE, respondent respectfully prays that the Commission's petition for a writ of certiorari be denied.

Respectfully submitted,

LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN AND BARTNICK

By: /s/ LEE R. FRANKLIN (P13649)
Counsel of Record
/s/ RICHARD E. SHAW (P33521)
Attorneys for Respondent
1301 East Jefferson
Detroit, Michigan 48207
(313) 259-7800

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